

Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.) and Theodore Owchariw and Union County Division of the Northern New Jersey Chapter, Inc., National Electrical Contractors Association, Inc., Party to the Contract. Case 22-CB-2879

May 20, 1976

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On January 15, 1976, Administrative Law Judge James V. Constantine issued the attached Decision in this proceeding. Thereafter, the Respondent Union and the General Counsel filed exceptions and supporting briefs. The Party to the Contract, by letter, joined in Respondent Union's exceptions. The General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, except as modified herein.

We agree with the Administrative Law Judge's holding that Respondent violated Section 8(b)(1)(A) of the Act by its discriminatory refusal to refer the Charging Party for employment under the terms of its exclusive referral system. However, we cannot agree with his conclusion that Respondent did not violate Section 8(b)(2) of the Act by the same conduct.

The Administrative Law Judge based his finding on the ground that "the record is bare of any evidence that Local 675 made any effort, whether directly or indirectly, to induce any employer to refuse employment to Owchariw." This conclusion must be rejected. The Board has consistently found a violation of Section 8(b)(1)(A) and (2) of the Act where a

union has discriminatorily refused to refer an employee for employment pursuant to the terms of an exclusive referral system in effect between the union and an employer.³ Such union conduct, by its very nature indirectly induces the Employer to refuse employment to that employee in violation of Section 8(a)(3). Hence, we find that by discriminatorily refusing to refer Owchariw for employment, the Respondent Union violated Section 8(b)(2).

We agree that it is inappropriate to defer to the arbitral forum but not for the reasons set forth by the Administrative Law Judge.⁴ The Board has held that it would not be consonant with statutory policy to defer to arbitration⁵ in cases where the interests of the aggrieved employee are in apparent conflict with the interests of the parties to the contract.⁶ In the instant case, it is clear that the interests of Owchariw and the parties to the contract are conflicting.⁷

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusion of Law 5:

"5. By discriminatorily refusing to refer Owchariw for employment pursuant to the terms of an exclusive referral agreement because he filed unfair labor practice charges with the National Labor Relations Board, and because he complained to Respondent's parent International Union about Respondent's lack of impartiality toward the membership, Respondent has violated Section 8(b)(1)(A) and 8(b)(2) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO, Elizabeth, New Jersey, its offi-

³ Local #624, *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Power Piping Company)*, 211 NLRB 942 (1974); *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 101 (Stearns-Roger Corporation)*, 206 NLRB 30 (1973); *International Union of Operating Engineers, Local 18, AFL-CIO (C. F. Braun Company)*, 205 NLRB 901, 910 (1973).

⁴ The Administrative Law Judge erred in finding that there is no applicable grievance procedure in the contract. The referral appeals procedure is clearly set out therein and we find that it is applicable to the circumstances here.

⁵ *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

⁶ *Kansas Meat Packers, a Division of Aristo Foods, Inc.*, 198 NLRB 543 (1972).

⁷ Member Jenkins would, in any event, not defer to arbitration for the reasons set forth in his dissent in *Collyer Insulated Wire*, *supra*.

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

² We agree with the Administrative Law Judge that Respondent failed to present sufficient evidence to establish that its reason for not referring Owchariw on October 24, 1974, was that the particular employer involved requested a member of a minority. We do not, however, pass upon the question of whether such reason would excuse the Union's conduct.

cers, agents, and representatives, shall take the action set forth in the said recommended Order as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Failing or refusing to refer to a job Theodore Owchariw or any applicant signing its referral list when his name or the name of such applicant is reached on said referral list, except to the extent that the collective-bargaining contract providing for such a referral list lawfully authorizes some other applicant to be referred ahead of any applicant on said referral list.

"(b) Causing or attempting to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act.

"(c) In any other manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

"(d) Discriminating against applicants for a job, including Theodore Owchariw, signing our referral list, by not referring them to a job, because they file charges with the National Labor Relations Board, or because they engage in other activities protected by the National Labor Relations Act, or because they complain to the International Union about hiring hall procedures."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT fail or refuse to refer to a job any applicant for a job, including Theodore Owchariw, signing our referral list, when his name is reached on said referral list, except to the extent that our collective-bargaining contract providing for such a referral list lawfully authorizes some other applicant to be referred ahead of any applicant on said referral list.

WE WILL NOT discriminate against applicants for a job, including Theodore Owchariw, signing our referral list, by not referring them to a job, because they file charges against us with the National Labor Relations Board, or because they engage in other activities protected by the National Labor Relations Act, or because they complain to our International Union about our hiring hall procedures.

WE WILL notify Theodore Owchariw that

when his name is reached on our referral list he will be sent to a job unless under the collective-bargaining contract someone signing after him is lawfully entitled to be sent out before him.

WE WILL make whole Theodore Owchariw for any loss of pay he may have suffered, with interest at the rate of 6 percent, by reason of our discriminating against him as an applicant for a job who signed our referral list by not referring him when his name was reached on said list.

WE WILL NOT cause or attempt to cause S & M Electric, or any other employer, to discriminate against any employee in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of rights guaranteed by the Act.

LOCAL UNION 675, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO

DECISION

STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Administrative Law Judge: This is an unfair labor practice case instituted pursuant to Section 10(b) of the National Labor Relations Act, herein called the Act. (29 U.S.C. 160(b).) It was commenced by a complaint issued on July 31, 1975, by the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director for Region 22 (Newark, New Jersey), naming Local Union 675 I.B.E.W. as Respondent and Union County Division of the Northern Jersey Chapter, Inc., National Electrical Contractors Association, Inc., as Party to the Contract. Said complaint is based on a charge and an amended charge filed respectively on January 27 and July 25, 1975, by Theodore Owchariw, the Charging Party herein.

In substance the complaint alleges that Respondent violated Section 8(b)(1)(A) and (2), and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent and the Party to the Contract each has answered admitting some of the allegations of the complaint but denying that any unfair labor practices were committed.

Pursuant to due notice this case came on to be heard before me at Newark, New Jersey, on October 22 and 23, 1975. All parties were represented at and participated in the hearing, and had full opportunity to introduce evidence, examine and cross-examine witnesses, file briefs, and offer oral argument. Briefs have been received from all parties.

This case presents the issues of whether Respondent:

1. Maintains and operates an exclusive job referral system whereby all electricians to be employed by employer members of the Party to the Contract must be referred to them by Respondent.

2. Failed and refused to refer the Charging Party for employment with employer members of the Party to the Contract when he applied for referral to employment with said employer members.

3. If Respondent did so refuse, did such refusal occur because he complained about its hiring procedures to Respondent's International Union and to the NLRB.

Upon the entire record in this case and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. AS TO JURISDICTION

The Party to the Contract, herein called NECA, and S & M Electric Co., herein called S & M, are New Jersey corporations. NECA, an employer itself, is an association of employers whose members are engaged in the electrical industry in New Jersey and in other States. S & M is an employer and as such is a member of NECA. NECA is authorized to bargain collectively for its members and to enter into a single collective-bargaining contract covering the employees of its members, and for many years NECA has done so.

In the year preceding July 31, 1975, the members of NECA provided and performed electrical services valued in excess of \$50,000, of which electrical services valued in excess of \$50,000 were performed in States other than New Jersey. I find, notwithstanding NECA's denial in its answer, that it and its constituent members, including S & M, are employers within the meaning of Section 2(2), and are engaged in commerce as defined in Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction over Respondent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO, herein called Local 675, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. General Counsel's Evidence

Theodore Owchariw, the Charging Party, testified substantially as follows as a witness for the General Counsel. He is an "electrician, inside by the trade." He started to learn such trade in Montreal, Canada, in 1949, and served an apprenticeship of 4 years there. In 1952 or 1954 he was admitted to membership to Local 568 IBEW, in said Montreal, and thereafter worked as a journeyman electrician in different cities in Canada until he immigrated to Elizabeth, New Jersey, in 1959. While living in Elizabeth he worked for 16 straight months under Local 581 of the IBEW in Morristown, New Jersey, but belonged to Local 568, IBEW, of Montreal during said period. Other jobs he worked on from 1972 to 1974 are given in General Counsel's Exhibit 3.

In 1961 he started to work in the Elizabeth, New Jersey, area. Although he did belong to said Local 568 but not to Local 675, he was referred to jobs in that area by John O'Connor, the business agent of Local 675, whom the answer of said Local 675 admits to be its agent within the contemplation of Section 2(13) of the Act. (The answer of NECA denies that Local 675 is a labor organization, that O'Connor is one of its business agents, and that Local 675 and NECA have been parties to a collective-bargaining contract covering electricians employed by employer members of NECA. But G.C.Exh. 2 is a contract between NECA and Local 675.) He had to show his card establishing his membership in the International Brotherhood of Electrical Workers each time O'Connor obtained a job for him.

Owchariw in 1971 or 1972 wrote to said International explaining that he was an American citizen, that he belonged to Local 568, and that his nonmembership in an American local of IBEW "holds me a little back from my work." The IBEW replied, "get in touch with Local 675 and make it on your own." Then he wrote a letter dated March 24, 1974, to the IBEW asserting that Local 675 discriminated against him as said Local's business agent "sends only those men out to work that he likes." See General Counsel's Exhibit 4. The IBEW's president replied by a letter dated April 2, 1974, informing him that "the matter has been referred to the International Vice President." See General Counsel's Exhibit 5. By letter dated April 9, 1974, said vice president wrote him to take his grievance to the Referral Appeals Committee. See General Counsel's Exhibit 6. So Owchariw on April 12 wrote to said vice president insisting that members of IBEW "must be protected." See General Counsel's Exhibit 7. He received a reply dated April 15. See General Counsel's Exhibit 8. He also went to see O'Connor, the business agent of Local 675, to whom he showed the letter (G.C.Exh. 6) directing him to see the Referral Appeals Committee, but O'Connor replied, "find out for yourself" as to whom Owchariw should see.

Later Owchariw found out who composed the executive board of Local 675 and presumed they would entertain his lack of being referred to jobs by O'Connor. Then Owchariw appeared before said executive board in November 1974.

On April 16, 1974, Owchariw filed a charge with the National Labor Relations Board against Local 675 alleging that it unlawfully failed to refer him to jobs. See General Counsel's Exhibit 9. This charge was withdrawn on May 7, 1974. On that date he was also "referred out" to a job. See General Counsel's Exhibit 3. He is required to have a permit from Local 675 to be referred out and he must renew said permit on the date marked on said permit requiring renewal. Failure to renew a permit on the date required deprived such person of the right to be referred until he obtained a new permit. On August 20, 1974, Owchariw was a day late, i.e., he went for it on August 21, in obtaining a renewal because of a water leak in the basement of his home, so that O'Connor refused to renew it. Such failure to renew caused Owchariw to lose his job at Maglio Electric. Owchariw then complained of this treatment to a newspaper on August 21, which published such complaint, see General Counsel's Exhibit 10. After this article was pub-

lished Owchariw was referred to a job with Valentine Electric. See also General Counsel's Exhibit 3.

Owchariw described "the procedures in the union hall that a man has to go through when he is being referred out." Such person arrives at such hall by 7:30 a.m. and signs his name and local union number on a list or referral book kept in the office on the second floor. Then he goes to the third floor where he waits until he is informed whether he will go out on a job or not. See General Counsel's Exhibit 11-A to 11-E for some of such referral lists for the group or category in which Owchariw belonged. The actual assignment or referral of such signers, i.e., Owchariw's group, for a specific period are given in General Counsel's Exhibit 12. To be included in such group i.e., group 1, a journeyman must possess certain qualifications. See article VII, and particularly 7.5 thereof, in the contract between Local 675 and NECA, in evidence as General Counsel's Exhibit 2. Owchariw is qualified to perform any "inside work," as he has been licensed by Elizabeth, New Jersey, to perform such work.

Since October 24, 1974, Owchariw daily went to the hall of Local 675 and signed the register or referral book. But he was not referred to any job since then except for one day's work in December (i.e., Dec. 17). In December 1974 and January 1975 he arrived at the hall about 6:45 a.m. every day, and found that he was not only the first one there but that the door would be locked at the time. Nevertheless on each occasion when the door was opened for him and he entered he found five to seven names already on said referral list notwithstanding "nobody would be around. [He] couldn't even get first on the list" even though he was the first to enter the hall. However, he was occasionally the first to sign such list, but even on these days he was never sent out except once, i.e., on December 17, 1974.

On cross Owchariw testified he was still a member of IBEW Local 568 in Montreal, Canada, but worked in the jurisdiction of Respondent Local 675 "under a travelling card from [his] home local in Montreal." He also had been referred to work in 1959 and 1960 by IBEW Local 581 in Morristown, New Jersey. He also testified that although his work permit once expired on August 20, 1974, because he was unable to get it renewed on time, Local 675 did renew it on August 24, 1974, and referred him to another job. And he further testified on cross that in 1970 he was referred to jobs by Local 675, and in 1971 and 1972 it referred him "on and off" to jobs.

Further, on cross, Owchariw testified that the union hall entrance door is opened at 7 a.m. in the morning by a carpenter's union agent;¹ that access to the referral book which applicants sign is reached through a window in front of the desk on which the book rests on the second floor of the hall; that he found such window open when the front door was unlocked at 7 a.m. and that such window remained opened until 9 a.m. or a little later. He added that although he was the first electrician to enter the building he observed the signatures of other electricians already in such book. An example is the list for December 13, 1974,

where Mikos Marione's name is the first on the referral list notwithstanding that Owchariw arrived there at 7 a.m. and Marione at 7:05 a.m. See General Counsel's Exhibit 11-C and 13-A. (13-A is Owchariw's reproduction of the first two names on 11-C.) Marione was referred to a job on said December 13.

Also on cross Owchariw testified that on those days when he was the first electrician to arrive at the union hall, he saw John O'Connor, business manager of Local 675, come in after him "quite a few" times in December 1974. On December 17 O'Connor sent him out on a 1-day job as Owchariw signed the referral book as the first one on that day. In fact Owchariw on cross claimed that on "many days" he signed the referral book in December 1974 and January 1975 as the first one "but I am still not working."

Carol Owchariw, wife of Theodore Owchariw, also was called as a witness by the General Counsel. An adequate summary of her testimony is here set forth. In August 1974, her husband informed her that "his work permit had expired and he couldn't renew it" while employed at Maggio Construction by reason of referral by Local 675. As a result she called on Business Manager O'Connor of said Local 675 to ascertain why O'Connor did not renew said permit. But O'Connor ordered her to get out or he "would call the bunny wagon . . . and get the police" if she did not leave. Consequently she left O'Connor's office and went to the Elizabeth Daily Journal. After speaking to said newspaper it printed an article about her husband's failure to get his permit renewed. See General Counsel's Exhibit 10.

At this point the General Counsel rested.

B. Respondent's Evidence

Respondent's only witness, John O'Connor, its business manager, testified substantially as follows. Local 675 has a three-story office building on East Grand Street in Elizabeth, some of which it occupies and some of which it also leases to other building crafts. The second floor has general offices while the third floor has additional offices and a dayroom. After an applicant for work signs the referral book on the second floor he goes to the dayroom on the third floor to "await a call for employment if and when it's available." On the second floor, where his office is located, there is an "area with a window for the referral procedure." Said window, which is "slidable," is about 2 feet by 2 feet, and "makes it accessible for an individual seeking employment to sign the book and fill out the referral card with his experience." Said window is kept locked all day except from 7 a.m. to 8 a.m. "for referral purposes only." See Respondent's Exhibit 1 for one of said referral cards.

When calls come to O'Connor from employers who want employees he tries to "match the requirement that an employer requests" with the qualifications of those who have signed the referral book, after which he goes to the third floor dayroom and calls an applicant by name "to go out to work." He arrives at his office prior to 7 a.m. and the front door to the building is unlocked before he gets there. O'Connor insists he never has allowed any applicant to sign the referral book "at the close of a day's business . . . for work on the next day," and has never permitted anyone to sign for another.

¹ The Carpenter's union occupied part of the building.

O'Connor has observed some applicants leave the premises after signing the referral book. But if such a person is not in the dayroom when O'Connor called him to go out on a job O'Connor would then call the next available man in the dayroom and send him out to the job. O'Connor also testified that article II of the collective-bargaining contract (G.C. Exh. 2) granted the employer the right to "call for a specific employee by name," and, under "those conditions [O'Connor is] obligated to supply that employee." In addition, according to O'Connor, "there are many classifications such as the welder, the burner and the splicer and a line man, a panel control wire man, to mention a few . . . In each of these instances [O'Connor] . . . selects a man who has that particular skill."

Continuing, O'Connor testified that Local 675 has "not received or accepted any transfers into Local 675 . . . in many, many years." This is because, as "a matter of economics," it is preferable to have people "working on a temporary referral for employment . . . rather than take them into membership and upset the economics of the entire area." See section 5, article XXV of the International constitution of IBEW which sanctions this by providing that each local union "shall have full autonomy to accept or reject all request [sic] for transfers." See Respondent's Exhibit 2. Also, articles 7.16 and 7.17 (VII in the contract) of the collective-bargaining contract provide for an appeals committee "to consider any complaint of any employee or applicant for employment arising out of the administration by the Local Union of Section 7.4 through 7.15 of this Agreement." See General Counsel's Exhibit 2.

On August 21, 1974, Owchariw was a day late in requesting that his referral be renewed. So O'Connor told him it could be renewed only before it expired the day before. Thereupon Owchariw left, but only after being told he could have it renewed on the following Monday. Shortly thereafter Mrs. Owchariw came in to see O'Connor without permission and screaming. O'Connor ordered her to leave and "suggested" to her that if she failed to do so he would call the police. She left. Her husband's work permit was renewed on the following Monday, and he was "subsequently assigned out to work."

O'Connor further testified that Local 675 uses a "formal employment termination report," prepared by supervisors on the jobsite. Its purpose is to "make available to [O'Connor's] office information on a particular individual's specialties perhaps or deficiencies." Some of these reports on Owchariw were offered in evidence as records kept in the regular course of business by Local 675, but as they were prepared by supervisors of each employer for whom Owchariw worked they were excluded absent evidence that they were prepared in the regular course of business of such employers.

On October 24, 1974, Owchariw signed the referral book ahead of Zappulla, Stauch, Rigby, and Schultes (See G.C. Exh. 11-A); but although they were sent out that day on jobs, he was not. (See G.C. Exh. 12). O'Connor described Rigby as a "member of Local 675, journeyman, electrician, wireman." Rigby, Stauch, and Zappulla were sent to the Molnar Buckeye project to do panel control wiring because "they have had experience in this type of work" and also because they went through "special programs and train-

ing" conducted by Local 675 "to train [its] men in panel wiring." But, according to O'Connor, Owchariw had not "gone through this type of training." Further, O'Connor claimed the employer "requested these men by name."

O'Connor also testified that Schultes was a "welder . . . above and beyond being an electrician." O'Connor on said October 24 assigned him to the Sheraton Hotel job because Schultes "either . . . was requested or he may have been the only one available for assignment at that moment."

On October 29, 1974, Richard Christopher signed the referral book after Owchariw (See G.C. Exh. 11-A for said date.) Christopher was sent out to a job, whereas Owchariw did not receive any assignment on that day. According to O'Connor, Christopher "is capable of welding" in addition to being a "journeyman wiring electrician," and "you must be a journeyman in order to be a welder . . . welding is considered an additional skill." Other journeymen "wiremen" or electricians who are also capable of welding are Edward Deem, Jacob F. Racon, and Thomas Roman. But a journeyman may not be sent out "to fill a slot of an apprentice." There are no apprentices on the referral list in evidence as General Counsel's Exhibit 11-A. And, the contract with NECA (See G.C. Exh. 2) provides in article VII, section 15, subsection A, "When an employer states *bona fide* requirements for special skills and abilities in his request for applicants, the Business Manager [of Local 675] shall refer the first applicant on the register possessing such skills and abilities." No call was ever received from an employer requesting that Owchariw be sent to a job.

O'Connor insisted on the witness stand that he has "never discriminated against anybody" in general, and Owchariw in particular, in sending and assigning anyone on the referring lists of Local 675. And O'Connor "on several occasions," about which he could not be specific as to dates, "attempted to find Mr. Owchariw to refer him out to work and didn't find him available in the day room" of Local 675. And O'Connor categorically stated, "under no circumstances have I prevented Mr. Owchariw from being sent out," or even "preferred another employee over Mr. Owchariw for work assignments outside the requirements of the contract . . . as shown by General Counsel's Exhibit 2." However, under said contract O'Connor may select anyone he wants to be the electricians' shop steward on any job.

On December 2, 1974, Owchariw's signature appears nine signatures above that of Pete Brennan on the referral list, but Brennan was selected on that day for the Sealand project because he could operate heavy electrical equipment while Owchariw could not. And on December 3, 1974, notwithstanding that Owchariw's signature appears first on the referral list, O'Connor selected number 13 on that list, i.e., Ed Deem was sent to the Rheem job on that day "as a foreman . . . at the employer's request . . ." On the Sealand job Gidosh was sent by O'Connor at the employer's request, and on the Merck jobs the employer requested specific individuals although "there was nothing unusual about those projects." On December 5, 1974, Borstein was sent to the Exxon job because he was "probably the only one available."

On December 19, 1974, Jacob Racon signed the referral list last and Owchariw signed second. Although Racon was

sent out to the Sheraton electric project, Owchariw was not assigned to any job on that day. O'Connor had "no recollection" why Racon was selected to work on this job. On December 23 Owchariw signed the referral list first. But Caruso and Gregory, both of whom signed after Owchariw, were sent to work at Kean College, whereas Owchariw did not get an assignment. Gregory was selected because he was to be foreman on this job. No reason was mentioned by O'Connor as to why Caruso, who was the 14th to sign, was selected over Owchariw, the 1st person to sign. Also on December 23 Kenna was selected to work on the Clark project for Prime Electric. Kenna's signature was number 24 on the referral list. According to O'Connor, Kenna was sent "at the request of the employer." And on said December 23 Zimmerman, who signed as number 26, was assigned to work at Kean College because "he was probably the only one available."

Continuing, O'Connor explained that "the hiring system closes down at 9 o'clock" each morning; but if he receives calls from employers for employees after that time he will select "anyone hanging around the hall . . . that is the day room." Consequently, on such occasions, which occurred "many, many" times, the men so assigned were not necessarily those entitled to priority but, rather, were those who were "available in the hall at a given moment."

On December 26 Cyhero and Kope, the last two who signed the referral list, were assigned to the Scheering project, notwithstanding that Owchariw signed first on that day. "That [sending Cyhero, who "may have been an apprentice", and Kope] was a request from the employer," according to O'Connor's testimony. Also, on January 6, 1975, Churchill and Deem were sent out as a result of a "request of the employer." But Kavalieros, who also was sent out on said January 6, was assigned to a job because "he would be the only one available in the hiring hall," even though he signed as number 35 and Owchariw signed as number 3 on said January 6.

Cain was assigned to a job on January 13 because "in all probability he was the only one available." On this day Owchariw's signature is the 4th one on the referral list, whereas Cain's is the 19th. And on January 24 Fullman, who signed seventh, was selected over Owchariw, who signed first, because "there was a request for a minority . . . by the employer. Joseph Fullman is a minority." Finally, on direct, O'Connor testified that on February 6, 1975, Caruso, who was third on the referral list (Owchariw having signed as the first), was sent out to the Buckeye project as a lineman because the employer had submitted a request for a lineman.

On cross O'Connor testified that he does not keep records disclosing that an employer made a request for a specific or particular individual, and that his testimony above that an employer desired that a certain employee be sent to a project was "to the best of my recollection." He also testified, in answering a question as to how he knew the individual qualifications of those signing a referral list, that "I am familiar enough with the people to know their experience . . . I believe my memory in dealing with the skills of all the people that come through the hall generally I know pretty well."

Further, on cross, O'Connor testified that he never dis-

cussed an applicant's skills" with any of those, including Owchariw, who "signed the referral list of Local 675 . . . I had no reason to discuss it with Mr. Owchariw . . . Generally I know their experiences . . . [because] I worked with them in the field." But he admitted he had no recollection of ever working with Owchariw.

Also, on cross, O'Connor stated that in those instances when an employer did not mention a specific individual to be sent to a job he, O'Connor, "would most certainly send the man out [who was] on top of the [referral] list." However, even the top man would not be sent out if he did not possess any special skills required on a particular job. That is why Peter Brennan was sent out as an equipment operator on December 2, 1974. In that case O'Connor did not send Owchariw, who had signed the referral list ahead of Brennan, because Owchariw did "not to my [O'Connor's] knowledge" have "the ability to perform that job." O'Connor also explained that sometimes early applicants for employment signed on the right side of the referral book, so that those signing on the left side actually signed at a later time. In such instances, if he noticed it, he first sent out those signing on the right side.

C. General Counsel's Rebuttal

Theodore Owchariw was recalled to testify for the General Counsel on rebuttal. A summary of such testimony follows. Owchariw is familiar with what constitutes the job of panel control wiring, and has performed such work on many occasions in both Canada and the United States. In fact he did such work "even under John's [O'Connor's] direction." Finally, he insisted that he was not aware of any training program put on by Local 675 to qualify a journeyman as a panel control wireman.

D. Concluding Findings and Discussion

1. As to alleged violations of Section 8(b)(2) of the Act

This segment of the Act provides that it shall be an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3) or to discriminate against an employee on some ground other than his failure to pay periodic dues and initiation fees. Paragraph 18 of the complaint herein alleges that Local 675 violated said Section 8(b)(2) by refusing to refer Owchariw for employment for reasons proscribed by the Act.

As set out below I have found that Local 675 has violated Section 8(b)(1)(A) of the Act by refusing to refer Owchariw for employment for discriminatory reasons. But the record is bare of any evidence that Local 675 made any effort, whether directly or indirectly, to induce any employer to refuse employment to Owchariw. Absent such evidence I am required to find that the General Counsel has failed to establish that Local 675 committed any violation of this section of the Act. Accordingly, I shall recommend that this aspect of the complaint be dismissed for lack of proof to sustain it.

2. As to the alleged violations of Section 8(b)(1)(A) of the Act

O'Connor testified on cross, and I credited him on this aspect of his testimony, that in those cases when an employer asked for an employee but did not mention a particular individual to be sent to the job, O'Connor "would most certainly send the man out [who was] on top of the [referral] list." Admittedly Owchariw was often on top of the referral list or at least ahead of the one sent out by O'Connor, but Owchariw was not on these occasions, except for December 17, 1974, sent out after October 23, 1974. O'Connor testified that he did not refer Owchariw on these occasions, giving reasons why O'Connor chose those who signed the referral list after Owchariw. Such occasions may be classified in groups, and these groups will be taken up and discussed below, beginning with subparagraph (a).

Article 7.4 of the contract (G.C.Exh. 2) provides that Local 675 "shall select and refer applicants for employment without discrimination against such applicants All such selection and referral shall be in accord with the following procedure. 7.5. The Union shall maintain a register of applicants for employment . . . 7.14 The Business Manager shall refer applicants to the Employer . . . in the order of their place on the 'Out of Work List' . . . 7.15. The only exceptions which shall be allowed in this order of referral are as follows: (A) When the Employer states *bona fide* requirements for special skills and abilities in his request for applicants, the Business Manager shall refer the first applicant on register possessing such skills and abilities." (B) Relates to "the age ratio clause in the Agreement" and is not pertinent here.

(a) O'Connor testified that he often sent applicants on the referral list who signed after Owchariw because the employer requested them by name. But nothing in the contract has been cited which grants to O'Connor as the Local 675 business manager or to the employer the right to disregard the order in which such applicants' names appear on the referral list, except as permitted by section 7.15 thereof. Hence I find that O'Connor could not for this reason send out an applicant who signed the referral list after Owchariw. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Los Angeles-Seattle Motor Express] v. N.L.R.B.*, 365 U.S. 667 (1961), in my opinion does not compel a contrary conclusion. The same comment applies to *Laborers' International Union of North America, Local No. 107 v. Kunco, Inc.*, 472 F.2d 456 (C.A. 8, 1973), for in that case the contract provided that the employer could request "men . . . by name."

Even if the contract permitted the employer to request an applicant by name, and thus could ask for one who had signed after Owchariw, and O'Connor could honor such request, I find that Respondent has failed to establish such requests on the record unfolded at the trial. This is because not a single employer was put on to testify that he requested any applicant by name, and also because O'Connor kept no record of such requests. It is true that Local 675 was not required to keep such records; but since it retained referral lists, some of which are in evidence as General

Counsel's Exhibit 11, it is reasonable to expect that a notation could have been made on such referral lists indicating which applicant was sent out ahead of another who signed before him. I am unable to accept O'Connor's oral testimony that he remembers every single person who was so selected out of turn over a period of several months. Further, O'Connor did not explain, and I do not infer, how an employer who asked for X knows that X has signed the referral list for any one particular day. For X may not have signed the referral list because of any number of reasons, such as illness or actual employment pursuant to being sent out by O'Connor on a job on which the employee is still engaged. Since the record fails to sustain the contention of Local 675 that it could disregard article 7.14 of the contract to "refer applicants to the employer . . . in the order of their place on the 'Out of Work List,'" I find that sending applicants who signed after Owchariw to jobs ahead of him because the employer asked for such persons by name discriminates against him.

(b) O'Connor also testified that he sent out some applicants who signed the referral list after Owchariw because the employer stated that special skills and abilities were required for the job. Article 7.15 of the contract does provide that, in such instances, "the Business Manager shall refer the first applicant on the register possessing such skills and abilities." O'Connor testified that Owchariw was sometimes not sent out, even though he signed before those who were referred, because he lacked the skills and abilities required on the job involved. But I do not credit O'Connor that Owchariw lacked such skills and abilities, as I credit Owchariw that he not only could perform that work which O'Connor claimed he could not, but that O'Connor has observed him perform such work. Additionally, I do not credit O'Connor, not only as he failed to state at the trial the basis for asserting that Owchariw lacked certain abilities, but also because O'Connor presented no corroborative evidence from any employer that the employer's job required special skills and abilities which a journeyman electrician lacked. In fact General Counsel's Exhibit 12, which is a compilation of referrals from October 24, 1974, to February 6, 1975, significantly does not allude to any special skills or abilities required for the jobs there described.

(c) O'Connor further testified that sometimes he sent out an applicant who signed after Owchariw because such applicant was the only one in the day room when O'Connor went there. Thus O'Connor assigned Zimmerman, who signed as number 26 on December 23, 1974, even though Owchariw signed as number 1 on that day, to a job because, according to O'Connor, Zimmerman "was probably the only one available." But I credit Owchariw that he was in the dayroom and available at the time. Hence I find that Owchariw was available on this occasion and that the failure to send him out was discriminatory.

(d) On December 19, 1974, Owchariw was the second applicant to sign the referral list and Racon the last. Yet O'Connor had "no recollection" why Racon, rather than Owchariw, was selected on this day. I find this was discriminatory. And on December 23 Owchariw, who signed 1st, was not sent out, but Caruso, who signed 14th, was selected by O'Connor over Owchariw. But O'Connor gave no reason in his testimony why he selected Caruso and

failed to send out Owchariw. I find this also discriminated against Owchariw.

(e) On said December 23 O'Connor referred Gregory to a job although Gregory was next to the last on the referral list for that day. O'Connor justified this on the ground that Gregory was to be the foreman on the job. I find that this was proper since O'Connor may choose anyone he wants to be foreman and is not obligated to have the foreman sign ahead of any other applicant on said referral list. Hence I find that Owchariw was not discriminated against when Gregory was selected for this job.

(f) O'Connor mentioned one instance of a man referred ahead of Owchariw although the latter had signed before that man because the person so referred was a member of a minority. But O'Connor failed to give any details indicating what minority such man belonged to and what quota had been established for such minority. Accordingly, I find that no satisfactory reason has been advanced for failing to extend to Owchariw the priority granted by the contract to those who sign the referral list ahead of others. See General Counsel's Exhibit 12 for the referrals of others than Owchariw since October 24, 1974.

(g) According to O'Connor one of those sent ahead of Owchariw was an apprentice. I find that this was nondiscriminatory, even though Owchariw signed ahead of such apprentice, since the contract in articles III and IV of the contract recognizes apprentices as a class by themselves.

3. As to whether the foregoing discriminatory conduct contravenes the Act

On April 16, 1974, Owchariw filed a charge (Case 22-CB-2663) alleging that the Respondent failed to refer him to jobs in violation of Section 8(b)(1)(A) of the Act. See General Counsel's Exhibit 9. And on March 21, 1974, he wrote to the International Brotherhood of Electrical Workers that Respondent Local 675 discriminated against him in referring him to jobs as said Local's "Business Agent sends only those men out to work that he likes." See General Counsel's Exhibit 4. The question then is whether the foregoing charge and complaining letter contributed entirely or substantially in causing O'Connor to discriminatorily refuse or fail to refer Owchariw to jobs on those occasions when, as found above, someone who signed the referral list after Owchariw was sent out on a job.

A critical examination of the record warrants the inference—and I draw it—that the above-described charge and complaining letter at least substantially caused O'Connor not to refer Owchariw to jobs when it was Owchariw's turn to be sent out according to his signature's place on the referral list. In drawing this inference I have not credited O'Connor's explanation, except on one occasion, as to why he referred persons on the list whose signatures appear after Owchariw's. The one referral on which I credit O'Connor is when he sent out an applicant on a job to be foreman; and, as found above, I have found this referral to be nondiscriminatory even though such foreman signed the referral list after Owchariw. However, merely discrediting O'Connor, without more, is insufficient to establish the motive behind his not sending out Owchariw.

But when an explanation is not credited the fact that it is

rejected may be considered with other evidence to determine the actual reason for not referring Owchariw when his name was on the referral list ahead of those sent out. Thus I find that after October 22, 1974, Owchariw worked only 8 hours, i.e., on December 17, and has not been referred to any job since then. See General Counsel's Exhibit 3 for his referrals from October 9, 1972, to the date of the hearing of this case in late October, 1975. Since I have been unable to accept O'Connor's explanations (except that for one referral) as to why Owchariw has not been referred to a job since said October 22 (except for an 8-hour job on December 17) I believe I am justified in concluding, and that it is reasonable to infer, that Owchariw's above charge and letter caused O'Connor to refuse or fail to refer Owchariw to a job on those occasions when those who signed the referral list after him were selected for jobs. This inference is in my opinion justified because Owchariw, who fairly regularly was sent out on jobs from October 9, 1972 to October 22, 1974 (see G.C.Exh. 3 for a compilation of such jobs), has not been sent out (except for a 1-day job on December 17, 1974), on a job since October 22, 1974. See also General Counsel's Exhibit 13, which is a record kept by Owchariw.

4. As to whether Owchariw should have submitted his grievance to the referral appeals committee

When Owchariw wrote to the International of Local 675 on March 21, 1974 (see G.C.Exh. 4), he was advised by the International's vice president letter of April 9, 1974, "that your complaint concerning the administration of the referral procedure by Local No. 675, IBEW should be taken up with the Referral Appeals Committee, which is specifically constituted to handle such matters . . ." See General Counsel's Exhibit 6. Admittedly Owchariw did not submit a "complaint concerning the administration of the referral procedure" to said referral appeals committee. But I am of the opinion that such inaction on his part does not prevent the Board from passing upon the merits of the charge which led to the present hearing. This is because I have been unable to find any grievance procedure in the contract (see G.C.Exh. 2) which applies to the facts found herein. It follows, as far as I can ascertain, that *Collyer Insulated Wire*, 192 NLRB 837 (1971), does not prevent me from passing on the merits of Owchariw's charge. Consequently I do not pass upon the question of whether Local 675 has waived a possible *Collyer* defense as it has not affirmatively pleaded it in its answer.

Finally, I find that Owchariw was not discriminated against "because he engaged in other activity protected by the Act," as alleged in paragraph 15, or that Local 675 "did cause employer-members of NECA to discriminate" against Owchariw to encourage membership in Local 675, as alleged in paragraph 18, of the complaint. This is because evidence to sustain such allegations is absent from the record.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those activities of Respondent set forth in section III, above, occurring in connection with the operations of NECA and its constituent members as described in section

I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

As Respondent has been found to have engaged in unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and that it take specific affirmative action, as set forth below, designed to effectuate the policies of the Act.

In view of the finding that Respondent discriminated against Owchariw by not referring him when he was entitled to be sent out on a job, it will be recommended that he be considered for such referral without any discrimination. It will further be recommended that he be made whole for any loss of earnings suffered by reason of the discrimination against him. In making him whole Respondent shall pay him a sum of money equal to that which he would have earned if he had been referred without discriminating against him, less his net earnings during such period. Such pay, if any, is to be computed on a quarterly basis in the manner established by *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at 6 percent calculated according to the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Finally, it will be recommended that Respondent post appropriate notices.

Upon the facts developed by this record Respondent's conduct does not in my opinion demonstrate a general disregard or hostility to the Act, and I so find. Accordingly, I find that a broad remedial order against Respondent is not warranted. Rather, I find that it will effectuate the policies of the Act to enjoin Respondent from repeating the type of unfair labor practice heretofore found as to any applicant for work signing its referral list.

Upon the foregoing findings of fact and the entire record in this case I make the following:

CONCLUSIONS OF LAW

1. Local 675 is a labor organization within the meaning of Section 2(5) of the Act.

2. NECA and its constituent members, including S & M, are employers within the meaning of Section 2(2), and are engaged in commerce as defined in Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction over Respondent in this proceeding.

3. At all times material Theodore Owchariw was an applicant for employment who signed the Local 675 referral list. Said list was maintained by Local 675 pursuant to its collective-bargaining contract with NECA. Said contract provides that Local 675 shall operate an exclusive hiring hall for NECA and its constituent members.

4. By discriminating against Owchariw by not referring him to jobs when his name was reached on the referral list, because he filed a charge with the Board and also complained to the International of Local 675 that Local 675

was not impartial to applicants signing said Local's referral list, Local 675 restrained and coerced Owchariw in the exercise of rights guaranteed to him in Section 7 of the Act.

5. By restraining and coercing Owchariw in the manner set forth in paragraph 4, *supra*, Respondent has engaged in unfair labor practices proscribed by Section 8(b)(1)(A) of the Act.

6. The foregoing unfair labor practices affect commerce within the purview of Section 2(6) and (7) of the Act.

7. Respondent has not committed any other unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ²

Respondent, Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO, Elizabeth, New Jersey, its officers, agents, and representatives, shall:

1. Cease and desist from failing or refusing to refer to a job Theodore Owchariw or any applicant signing its referral list when his name or the name of such applicant is reached on said referral list, except to the extent that the collective-bargaining contract providing for such a referral list lawfully authorizes some other applicant to be referred ahead of any applicant on said referral list.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify Theodore Owchariw that when his name is reached on Respondent's referral list he will be sent to a job unless under the collective-bargaining contract someone signing after him is lawfully entitled to be sent out before him.

(b) Make Theodore Owchariw whole for any loss of pay he may have suffered, with interest at the rate of 6 percent, by reason of Respondent's discriminating against him, as provided in the section above entitled "The Remedy."

(c) Post at its business offices, its referral hall, and its dayroom, copies of the attached notice marked "Appendix." ³ Copies of said notice, provided by the Regional Director for Region 22, after being signed by a duly authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respon-

² In the event no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and the recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³ In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps

have been taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.